

BRB No. 99-1159 BLA

WALTER HOOPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (1997-BLA-1187) of Administrative Law Judge Donald W. Mosser (the administrative law judge) awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case involves a duplicate claim. Claimant<sup>1</sup> initially filed a claim for benefits on September 20, 1973, which was denied in a Decision and Order issued by Administrative Law Judge Reid C. Tait on October 10, 1985 because claimant failed to establish that his pneumoconiosis arose from his coal mine employment or that he had a

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<sup>1</sup>Claimant is Walter Hoops, the miner.

totally disabling respiratory or pulmonary impairment. Director's Exhibit 29. Claimant filed two additional claims for benefits on March 14, 1988 and September 5, 1992, which were denied on October 5, 1988 and March 3, 1993, respectively, because claimant failed to establish any of the elements of entitlement and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibits 30, 31.

On June 17, 1996, claimant filed his fourth claim for benefits which was denied by the district director on October 15, 1996 because claimant failed to establish any of the elements of entitlement. Director's Exhibits 1, 16. Claimant filed a fifth claim for benefits on July 21, 1997, which was considered to be a request for modification pursuant to 20 C.F.R. §725.310 because it was filed within a year of the prior denial. Director's Exhibit 18. In the instant Decision and Order, the administrative law judge found that claimant established five and three-quarter years of qualifying coal mine employment, considered the evidence submitted with claimant's fourth claim for benefits and determined that claimant established that he is totally disabled due to pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(c), 718.204(b), (c)(1), (2) and (4) and, consequently, he had demonstrated a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were awarded.

On appeal, the Director contends that the administrative law judge erred in crediting the opinions of Drs. Simpao and Cole pursuant to Section 718.202(a)(4) and in failing to consider the entire record to determine if claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718. Claimant responds, urging affirmance of the administrative law judge's award of benefits.<sup>2</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe*

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<sup>2</sup>We affirm the administrative law judge's findings regarding the length of claimant's coal mine employment and that the evidence submitted since the filing of claimant's fourth claim is sufficient to establish that claimant has total respiratory disability pursuant to Sections 718.204(c)(1), (2) and (4) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

*v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 725.310, a party may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in determining whether claimant has established a mistake in a determination of fact pursuant to Section 725.310, the administrative law judge must consider all of the evidence of record to determine if the evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The court also held that the scope of modification extends to whether the “ultimate fact (disability due to pneumoconiosis) was wrongly decided...” *Worrell, supra*. When a claimant requests modification pursuant to Section 725.310, of a previously denied duplicate claim, the administrative law judge must consider whether the newly submitted modification evidence along with the duplicate claim evidence is sufficient to establish a material change in conditions pursuant to Section 725.309. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

The instant claim was initially denied because claimant failed to establish any of the elements of entitlement and, as a consequence, failed to establish a material change in conditions pursuant to Section 725.309. Director’s Exhibit 16. The administrative law judge, in the instant Decision and Order, considered the evidence submitted since the filing of claimant’s fourth claim for benefits and found that claimant established total disability due to pneumoconiosis which arose from his coal mine employment pursuant to Sections 718.202(a)(4), 718.203(c), 718.204(b), (c)(1), (2) and (4). Regarding the issue of claimant’s total disability, the Director does not contest the administrative law judge’s finding that the evidence submitted since the filing of claimant’s fourth claim is sufficient to establish that claimant suffers from total respiratory disability pursuant to Section 718.204(c)(1), (2) and (4), and thus claimant established a mistake in a determination of fact in the prior finding that claimant failed to establish a material change in conditions pursuant to Section 725.309.<sup>3</sup>

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<sup>3</sup>The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove “under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him.” *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1995). In the instant claim, because claimant’s prior claim was denied because he failed to establish any of

Director's Brief at 21; Decision and Order at 11; *see also* 20 C.F.R. §725.310. However, after his threshold determination that claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge did not consider all of the evidence of record to determine if claimant established entitlement to benefits pursuant to Part 718. Decision and Order at 12; *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1995); *Worrell, supra*; *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). As a result, we must vacate the administrative law judge's award of benefits and remand the claim for the administrative law judge to consider all of the evidence of record pursuant to Part 718 under to the Sixth Circuit's holding in *Ross*.

In addition the administrative law judge must make findings sufficient to satisfy the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), regarding

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the elements of entitlement, the evidence developed subsequent to the prior denial must establish at least one of those elements. *See* Director's Exhibit 16; 20 C.F.R. §§718.3, 718.202, 718.204; *Ross, supra*; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

whether claimant has established entitlement to benefits.<sup>4</sup> Specifically, when addressing the medical opinion evidence of record, the administrative law judge must determine whether the physician's opinion is sufficiently documented and reasoned by examining the validity of the physician's reasoning in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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<sup>4</sup>The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). The failure of the administrative law judge to address all relevant evidence, explain his rationale, or clearly indicate the specific statutory or regulatory provisions involved in his decision, requires remand. An administrative law judge must provide a sufficient rationale that explains the relationship between the findings and conclusions and independently evaluate the evidence of record. If there is no independent evaluation of the evidence, the parties are deprived of their rights. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *see Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for findings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge